

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

MICHAEL COYNE,

Appellant,

v.

DEPARTMENT OF SOCIAL AND HEALTH  
SERVICES,

Respondent.

) Case No. DEMO-02-0008

)  
) FINDINGS OF FACT, CONCLUSIONS OF  
) LAW AND ORDER OF THE BOARD

**I. INTRODUCTION**

1.1 **Hearing.** Pursuant to RCW 41.64.060 and WAC 358-01-040, this appeal came on for hearing before the Personnel Appeals Board, GERALD L. MORGEN, Vice Chair. The hearing was held at the Department of Labor and Industries, Spokane, Washington, on February 19, 2003. WALTER T. HUBBARD, Chair, reviewed the file and record and participated in the decision in this matter.

1.2 **Appearances.** Appellant Michael Coyne was present and was represented by Paul Burns, Attorney at Law. Paige Dietrich, Assistant Attorney General, represented Respondent Department of Social and Health Services.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of demotion for Appellant's use of the word "wetbacks" during a meeting between employees of the Department of Social and Health Services' Division of Fraud Investigations and members of the Spokane Police Department.

1.4 Citations Discussed. WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983); Schley v. Dep't of Corrections, PAB No. DISM-97-0049 (1999); Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992); WAC 356-54-010, et seq; WAC 356-56-500.

## II. FINDINGS OF FACT

2.1 By letter dated February 13, 2002, John Bumford, Director of Division of Fraud Investigations, notified Appellant Michael Coyne of his demotion from Bi-Regional Manager (Washington Management Service) to Investigator 2 (Washington General Service), effective March 1, 2002. Mr. Bumford demoted Appellant for his use of the term "wetbacks" during an October 5, 2001 meeting between the employees of the Division of Fraud Investigations and members of the Spokane Police Department. Appellant filed a timely appeal with the Personnel Appeals Board on March 18, 2002.

2.2 Appellant's responsibilities as a Bi-Regional Manager included the supervision of 19 to 20 subordinates. Appellant managed the Fraud Early Detection Program and the Criminal Investigations Program within the Division of Fraud Investigations. Appellant was responsible for two regions, including parts of Central Washington, which includes a large Hispanic community.

2.3 At the time of his employment, Appellant received a copy of the Department of Social and Health Services Administrative Policy No. 6.04. The policy states:

DSHS requires employees to perform duties and responsibilities in a manner that maintains standards of behavior that promote public trust, faith, and confidence. Specifically, employee shall:

1. Strengthen public confidence in the integrity of state government by demonstrating the highest standards of personal integrity, fairness, honesty, and compliance with laws, rules, regulations and departmental policies.

2. Create a work environment that is free from all forms of discrimination and sexual/workplace harassment. The includes, but is not limited to:

Following and abiding by departmental policies regarding nondiscrimination, sexual harassment, and client rights....

- Serves the public with respect, concern, courtesy, and responsiveness, recognizing that service to the public is the primary mission of state government.

4. Interact with co-workers with respect, concern, courtesy, and responsiveness.

2.4 Appellant has received no prior formal discipline, however, he received a counseling memo from Mr. Bumford on September 17, 2001 reprimanding Appellant for his use of racial slurs. Mr. Bumford warned Appellant of the serious nature of his inappropriate conduct and stressed that racial slurs have no place in the workplace. He also warned Appellant that use of racial slurs violated Administrative Policy No. 6.04 and was intolerable, especially when used by a person in a management position. Mr. Bumford stated that any similar incidents could result in Appellant's reduction in salary, suspension, and/or dismissal.

2.5 On October 5, 2001, Appellant unofficially chaired a meeting he initiated between the Division of Fraud Investigations and the Spokane Police Department. The meeting was held in a conference room at the Department of Social and Health Services office. Approximately five investigators under Appellant's supervision attended the meeting. In addition, several officers from the Spokane Police Department attended the meeting.

2.6 The purpose of the meeting was to discuss future cooperation between the two law enforcement agencies to combat welfare fraud. During a discussion regarding illegal immigrants engaging in welfare fraud, Appellant used the term “wetbacks.”

1 2.7 Sheila Chase, Investigator 2, telephoned Robin Clawson, Fraud Investigations Operations  
2 Administrator, on November 2, 2001 to report Appellant's use of the term "wetbacks" at the  
3 meeting.

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5 2.8 Mr. Bumford initiated an investigation into the allegation. Ms. Clawson interviewed  
6 meeting participants from both law enforcement agencies. A majority of the meeting attendees  
7 witnesses recalled Appellant's use of the term "wetbacks."

8  
9 2.9 Mr. Bumford initiated a Conduct Investigation Report on November 13, 2001. Appellant  
10 responded on November 19, 2001. Appellant did not deny he used the term "wetbacks." However,  
11 he denied that the term was a racial slur, claiming that it was an informal noun that describes a  
12 person "doing an illegal act."

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14 2.10 Mr. Bumford reviewed the Conduct Investigation Report and Appellant's written response  
15 to determine whether Appellant's behavior constituted misconduct. Mr. Bumford also reviewed  
16 Appellant's training profile and personnel file. Mr. Bumford examined his September 17, 2001  
17 counseling memo to Appellant addressing similar behavior. He decided that Appellant's use of the  
18 term "wetbacks" was an aggravated instance of misconduct since he had specifically admonished  
19 Appellant about such conduct only 17 days earlier. Mr. Bumford was not convinced by Appellant's  
20 assertion that "wetback" was an "informal noun, no different from a 'fleeing felon' or 'outlaw.' "  
21 Mr. Bumford was concerned by Appellant's response that the term was not a racial slur. Mr.  
22 Bumford considered termination of Appellant, however, he decided that demotion was the least  
23 severe level of discipline that would prevent recurrence and deter others from such behavior.

### III. ARGUMENTS OF THE PARTIES

3.1 Respondent argues that the term “wetbacks” is offensive, inflammatory, and highly inappropriate and unacceptable in the workplace. Respondent asserts that the term is inappropriate even if no one reported being offended by Appellant’s use of the term. Respondent argues that Appellant’s use of the term was directly contrary to the letter of reprimand he received just 17 days earlier. Respondent states that Appellant acknowledged that he would not have used the term if any person of Hispanic origin had been present at the meeting because it would have been offensive to them. Respondent asserts that Appellant reveals the depth of his lack of understanding and insight by denying the term is a racial slur that is offensive. Respondent argues that Appellant must represent the agency in a highly professional manner while contacting the public, in addition to modeling professional behavior to his subordinates. Respondent states that it is in the interest of the agency to be above reproach in terms of fair and unbiased investigations of welfare recipients, regardless of race or ethnic background. Further, Respondent argues that Appellant has demonstrated his inability to recognize or control his use of offensive language. Therefore, Respondent asserts that demotion is the appropriate sanction.

3.2 Appellant argues that Respondent’s decision to demote Appellant was in violation of WAC 356-34-010 and Appellant’s First Amendment rights under the United States Constitution. Appellant asserts that the evidence is insufficient to establish any cause for Appellant’s demotion and reduction in pay under WAC 356-34-010. Appellant states that there were no persons of Hispanic descent at the meeting, a number of the participants did not hear Appellant use the term “wetbacks,” and none of the participants were offended by the term. Appellant argues that the term was not intended as a racial slur, was not taken as a racial slur, and Appellant did not intend to willfully violate any published department rules. Appellant asserts that the use of the term did not create a hostile work environment and did not interfere with the meeting or the effective functioning of the Division of Fraud Investigations or the Spokane Police Department. Appellant states that the

comment cannot reasonably be characterized as racially offensive when considering the time, place, and manner the comment was made and because the dictionary definitions of the term differ as to whether the term is offensive. Appellant asks that the decision be reversed, and that he be reinstated to his former management position with back pay.

#### IV. CONCLUSIONS OF LAW

4.1 Washington Management Service employees may appeal disciplinary actions to the Personnel Appeals Board under WAC 356-56-600.

4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting the charges upon which the action was initiated by proving by a preponderance of the credible evidence that Appellant committed the offenses set forth in the disciplinary letter and that the sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983).

4.3 Appellant was in a Washington Management Service (WMS) position at the time of this disciplinary action. Chapter 356-56 WAC establishes a system of personnel administration for WMS employees. Disciplinary action for WMS employees is provided for in WAC 356-56-500, which states; in part:

Appointing authorities may demote, suspend, reduce in salary, or dismiss a permanent Washington Management Service employee for cause. The disciplinary process shall be administered in accordance with WAC 356-34-020 through 356-34-070.

4.4 Appellant argues that Respondent failed to offer sufficient evidence to support his demotion, in part, because the alleged misconduct does not constitute any of the specific causes for discipline provided in WAC 356-34-010 (i.e., neglect of duty, inefficiency, incompetence, insubordination,

1 indolence, conviction of a crime involving moral turpitude, malfeasance, gross misconduct, or  
2 willful violation of the published employing agency or Department of Personnel rules or  
3 regulations). However, WAC 356-56-500 authorizes appointing authorities to impose disciplinary  
4 sanctions on Washington Management Service employees “for cause.”

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6 4.5 Discipline or dismissal of Washington Management Service (WMS) employees for cause  
7 under WAC 356-56-500 does not require the citation of one or more of the specific causes for  
8 discipline or dismissal of general service employees enumerated in WAC 356-34-010, nor does the  
9 rule require the misconduct or other unacceptable performance to be characterized as such.

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11 4.6 WMS employees subject to disciplinary actions are afforded due process under WAC 356-  
12 56-500, which requires that the disciplinary process be administered in the same manner as  
13 discipline for general service employees. For example, the discipline must be based on specified  
14 charges provided in writing to the employee at least 15 calendar days prior to the effective date of  
15 the action under WAC 356-34-020. WMS employees have the right to appeal disciplinary actions  
16 to the Personnel Appeals Board under WAC 356-56-600. At a hearing on appeal, the agency  
17 employer bears the burden of proof and the Board reviews and determines whether the disciplinary  
18 action is justified and appropriate under the facts and circumstances.

19  
20 4.7 Appellant also asserts that his freedom of speech guaranteed under the First Amendment  
21 precludes Respondent from taking disciplinary action. An employee’s speech must be on a “matter  
22 of public concern” in order to trigger constitutional protection. *Connick v. Myers*, 461 U.S. 138,  
23 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). The subject of the meeting between DSHS employees and  
24 the Spokane Police – cooperation in investigation of welfare fraud – was a matter of public concern.  
25 However, even when an employee’s speech pertains to a matter of public concern, the First  
26 Amendment protection is not absolute. The employee’s interest in speaking must be balanced

1 against the employer's right to an orderly work environment. *Pickering v. Board of Education*, 391  
2 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). The Supreme Court has also described the balance  
3 against the employer's interest in promoting the efficiency of public services it performs through its  
4 employees. *Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987).  
5 Appellant was not disciplined for his participation in the meeting or for any comments critical of his  
6 employer agency. Rather, he was demoted from his managerial position for his use of the  
7 inflammatory term "wetbacks" while discussing his previous experience as a law enforcement  
8 officer.

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10 4.8 Respondent's policies are clear that discrimination and racial slurs are not acceptable under  
11 any circumstances and will not be tolerated by the agency. Appellant was aware of the standards of  
12 conduct expected in the workplace. Respondent has met its burden of proving by a preponderance  
13 of the credible evidence that Appellant violated these standards when he used a racially or  
14 ethnically insensitive and inappropriate term in the workplace.

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16 4.9 In Schley v. Dep't of Corrections, PAB No. DISM-97-0049 (1999), we addressed  
17 misconduct of a nature similar to that presented here. In Schley, we concluded that an employee  
18 made offensive, inappropriate comments that could reasonably be perceived to be racially  
19 motivated and that while the employee was entitled to have his own opinions, it was not appropriate  
20 for him to voice his opinions in the workplace when those opinions could offend others. We further  
21 concluded that the egregious nature of the employee's comments warranted dismissal, that the  
22 admitted comments alone were offensive, inappropriate, and racial in nature, and that such conduct  
23 in the workplace should not be tolerated. In Schley, we upheld dismissal of the employee.

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25 4.10 More recently, this Board found that an employee violated expected standards of conduct  
26 when he used a hateful, inflammatory and highly inappropriate term in the workplace. In Gorman  
v. University of Washington, PAB No. DISM-01-0014 (2003), we concluded that racial epithets



1 and negative ethnic stereotypes should not be condoned in the workplace and upheld dismissal of  
2 the employee.

3  
4 4.11 In determining whether a sanction imposed is appropriate, consideration must be given to  
5 the facts and circumstances, including the seriousness and circumstances of the offenses. The  
6 penalty should not be disturbed unless it is too severe. The sanction imposed should be sufficient to  
7 prevent recurrence, to deter others from similar misconduct, and to maintain the integrity of the  
8 program. Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

9  
10 4.12 The Department of Social and Health Services has the responsibility to prohibit its  
11 employees from using ethnic slurs and has a corresponding duty to discipline employees for  
12 repeated incidents of this nature.

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14 4.13 Appellant's use of the term "wetbacks" is sufficient cause for discipline. The disciplinary  
15 sanction of demotion was appropriate under the circumstances presented here. The Appointing  
16 Authority's decision to demote Appellant was not too severe.

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18 **V. ORDER**

19 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Michael Coyne is denied.

20  
21 DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2003.

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23 WASHINGTON STATE PERSONNEL APPEALS BOARD

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26 Walter T. Hubbard, Chair

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Gerald L. Morgen, Vice Chair